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Trengganu Forest Products Sdn Bhd v Cosco Container Lines Company Ltd & Anor

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5–22–412 OF 1997
RAMLY ALI J
8 JANUARY 2009

C

Limitation — Striking out action on ground of time bar — Strike out plaintiff's claim — Allegation that cause of action time-barred — Accrual of cause of action — Matter already been decided by Court of Appeal — Raising same issue at this stage of proceedings — Whether estopped

D

Shipping and Navigation — Carriage of goods — Bill of lading — Significance and importance of bill of lading — Where bill of lading did not represent true state of affairs regarding shipment of goods — Backdating bill of lading in order E *to bring it within shipment time in credit — Whether act of fraud amounting to forgery*

Tort — Deceit — Fraud — Bill of lading — Fraudulent misrepresentations — F *Knowingly or recklessly making false statement — Date of shipment on bill of lading untrue — Essential elements to establish an action for deceit or fraud — Whether established — Plea of ex turpi causa non oritur action — Allegation that plaintiff requested defendants to make representation in bill — Whether established beyond reasonable doubt*

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The plaintiff had agreed to sell 56 containers of plywood to Hebei Metal & Minerals Import and Export Corporation ('the buyer'). For the purpose of the shipment, the plaintiff entered into a contract of carriage for the cargo H with the defendants. The said contract was to be evidenced by a bill of lading on the following terms: (a) the defendants are to issue a shipped on board bill of lading dated 30 April 1994; and (b) the cargo should be transported from Port Klang direct to Xingang Port, China. The bill of lading was to be issued by the defendants indicating compliance with the said terms. The second I defendant was at all material times the agent of the first defendant. The first defendant issued the bill of lading as 'shipped on board' on 30 April 1994 about the vessel at Port Klang and for discharge at Xingang Port, China, purporting to enter into the contract of carriage with the plaintiff. The defendants in the bill of lading made the following

representations/statements: (a) the cargo was shipped on board on 30 April 1994; and (b) the vessel's port of discharge was Xingang Port, China. Relying on the said representations, the plaintiff submitted, inter alia, the bill of lading to the negotiating bank for due payment pursuant to a letter of credit. However, the buyer obtained an injunction to stop the Bank of China, Changsha from releasing funds pursuant to the letter of credit on the ground that the bill of lading was fraudulent. It was subsequently discovered that the cargo was not 'shipped on board' on 30 April 1994 as represented by the bill of lading and the cargo was in fact discharged at Hong Kong before being transshipped on another vessel to Xingang Port, China. The plaintiff's cause of action against the defendants herein was for the tort of deceit by virtue of the fraudulent misrepresentation made by the defendants in the bill of lading. The plaintiff's claim against the defendants was for compensation for the sum of US$1,446,469.58 for the loss and damage suffered by the plaintiff in relying on the said bill of lading issued by the defendants. The defendants admitted that the date on the bill of lading was false. The defendants however, alleged that the plaintiff had failed to prove that the defendants intended (or induced) the plaintiff to act on the false representation in light of the clear and convincing evidence to the plaintiff's own involvement in the backdating of the bill of lading itself. The defendants further contended that the plaintiff had the motive to produce a bill of lading dated 30 April 1994 knowing fully well that the vessel would not be able to load on or before the aforesaid date; and that the plaintiff had requested the defendant to backdate the bill of lading to 30 April 1994. The plaintiff however, denied this allegation. The following two issues were raised for the consideration of the court: (a) whether the defendants had fraudulently misrepresented to the plaintiff the date on the bill of lading; and (b) whether the plaintiff's suit was time barred under the applicable law.

Held, allowing the plaintiff's application with costs:

(1) It is settled that a person can be held liable in tort to another if he knowingly or recklessly makes a false statement to that other with the intent that it would be acted upon and that other does act upon it and suffers damage. In this case, the plaintiff had established beyond reasonable doubt that the defendants are liable to the plaintiff for the tort of deceit in making fraudulent misrepresentations in the bill of lading. Further, the defendants had admitted to issuing the fraudulent bill of lading (see paras 17 & 34).

(2) The defendants had failed to discharge the onus of proving fraud on the part of the plaintiff and in fact, have merely as an afterthought raised the allegation that it was the plaintiff who had instructed the defendants to make the said representation in the bill of lading. The defendants'

defence of *ex turpi causa non oritur actio* failed. In fact, this defence was raised by the defendants for the first time when they filed their defence to this action (see para 39).

(3) The importance of issuing a genuine and valid bill of lading in mercantile trade cannot be disputed. The bill of lading, by virtue of the fraudulent misrepresentations contained therein was a nullity and therefore deemed all transactions involving the plaintiff and the buyer to be frustrated. The defendants who made the fraudulent misrepresentations in the bill of lading were therefore wholly liable to the plaintiff for all damages suffered by the plaintiff as a result of the frustrated contract between the buyer and the plaintiff (see para 50).

(4) The defendants could not be allowed to raise the issue of limitation again at this stage of the proceedings as the matter had already been decided upon and the Court of Appeal in dismissing the defendants' application had directed that this matter proceed to full trial (see para 55).

[Bahasa Malaysia summary

Plaintif telah bersetuju untuk menjual 56 kontena papan lapis kepada Hebei Metal & Minerals Import and Export Corporation ('pembeli'). Bagi tujuan penghantaran, plaintif memasuki satu kontrak penghantaran kargo dengan defendan-defendan. Kontrak tersebut adalah melalui bil muatan atas terma-terma berikut: (a) defendan-defendan perlu mengeluarkan bil muatan 'dimuatkan atas kapal' yang bertarikh 30 April 1994; dan (b) kargo tersebut perlu dihantar dari Pelabuhan Kelang terus ke Pelabuhan Xingang, China. Bil muatan perlu dikeluarkan oleh defendan-defendan menyatakan pematuhan terhadap terma-terma tersebut. Defendan kedua adalah pada kesemua masa material seorang agen defendan pertama. Defendan pertama mengeluarkan bil muatan 'dimuatkan atas kapal' pada 30 April 1994 atas kapal di Pelabuhan Kelang dan pemunggahan di Pelabuhan Xingang, China, bertujuan untuk memasuki kontrak penghantaran dengan plaintif. Defendan-defendan di dalam bil muatan membuat kenyataan-kenyataan/representasi-representasi berikut: (a) Kapal telah dimuatkan pada 30 April 1994; dan (b) pelabuhan pemunggahan kapal adalah Pelabuhan Xingang, China. Bergantung atas representasi tersebut, plaintif mengemukakan, antara lain, bil muatan kepada bank yang berunding untuk pembayaran menurut surat kredit. Walau bagaimanapun, pembeli memperoleh injunksi untuk menghalang Bank of China, Changsha daripada membuat bayaran menurut surat kredit atas alasan bahawa bil muatan dibuat secara fraud. Ia kemudian didapati bahawa kapal tersebut tidak 'dimuatkan atas kapal' pada 30 April 1994 seperti yang dikatakan oleh bil muatan dan kapal tersebut sebenarnya dipunggah di Hong Kong sebelum dipindahkan ke sebuah kapal lain ke Pelabuhan Xingang,

China. Kausa tindakan plaintif terhadap defendan-defendan di sini adalah untuk tort penipuan disebabkan oleh salah nyata fraud yang dibuat oleh defendan-defendan di dalam bil muatan. Tuntutan plaintif terhadap defendan-defendan adalah untuk pampasan sejumlah US$1,446,469.58, yang merupakan kerugian dan kerosakan yang dialami oleh plaintif dalam menyandar atas bil muatan yang dikeluarkan defendan-defendan. Defendan-defendan mengakui bahawa tarikh di atas bil muatan adalah salah. Walau bagaimanapun defendan-defendan, mendakwa bahawa plaintif telah gagal untuk membuktikan bahawa defendan-defendan berniat (atau menyebabkan) plaintif bertindak atas representasi salah berdasarkan kepada keterangan yang jelas dan meyakinkan terhadap penglibatan plaintif sendiri dalam mengebelakangkan tarikh bil muatan itu sendiri. Defendan-defendan selanjutnya menghujah bahawa plaintif mempunyai motif untuk mengemukakan bil muatan bertarikh 30 April 1994 walaupun mengetahui bahawa kapal tersebut tidak boleh dimuatkan pada atau sebelum tarikh yang dikatakan; dan bahawa plaintif telah meminta defendan untuk mengebelakangkan tarikh bil muatan kepada 30 April 1994. Plaintif, walau bagaimanapun, menafikan dakwaan ini. Dua isu berikut telah dibangkitkan untuk pertimbangan mahkamah: (a) sama ada defendan-defendan telah melakukan salah nyata fraud kepada plaintif tarikh pada bil muatan; dan (b) sama ada guaman plaintif adalah dihadkan oleh masa di bawah undang-undang yang beraplikasi.

Diputuskan, membenarkan permohonan plaintif dengan kos:

(1) Ia adalah mapan bahawa seseorang boleh diputuskan sebagai bertanggungjawab di dalam tort kepada seorang yang lain jika dia mengetahui atau secara cuai membuat kenyataan salah kepada orang yang lain itu dengan niat orang itu akan bertindak terhadapnya dan orang itu sememangnya bertindak berdasarkan salah nyata itu dan mengalami kerugian. Di dalam kes ini plaintif telah membuktikan melampaui keraguan yang munasabah bahawa defendan-defendan adalah bertanggungjawab kepada plaintif terhadap tort penipuan dalam membuat salah nyata fraud di dalam bil muatan. Tambahan, defendan-defendan telah mengakui mengeluarkan bil muatan secara fraud (lihat perenggan 17 & 34).

(2) Defendan-defendan telah gagal melepaskan beban pembuktian fraud pada pihak plaintif dan sememangnya, hanya sebagai fikir semula telah membangkitkan dakwaan bahawa ia adalah plaintif yang mengarahkan defendan-defendan untuk membuat representasi tersebut di dalam bil muatan. Pembelaan *ex turpi causa non oritur actio* defendan-defendan telah gagal. Malahan, pembelaan ini dibangkitkan oleh

defendan-defendan pada kali pertama apabila mereka memfailkan pembelaan mereka terhadap tindakan ini (lihat perenggan 39).

(3) Kepentingan mengeluarkan bil muatan yang betul dan sah dalam perniagaan merkantil tidak boleh dinafikan. Bil muatan, disebabkan oleh salah nyata fraud yang terkandung di dalamnya adalah batal dan oleh itu menyebabkan kesemua transaksi yang melibatkan plaintif dan pembeli sebagai dikecewakan. Defendan-defendan yang membuat salah nyata fraud di dalam bil muatan oleh itu adalah bertanggungjawab sepenuhnya terhadap plaintif bagi semua kerugian yang dialami oleh plaintif disebabkan oleh kontrak yang dikecewakan di antara pembeli dan plaintif (lihat perenggan 50).

(4) Defendan-defendan tidak boleh dibenarkan untuk membangkitkan isu had masa sekali lagi di peringkat prosiding ini kerana perkara tersebut telah pun diputuskan dan Mahkamah Rayuan dalam menolak permohonan defendan-defendan telah mengarahkan perkara ini diteruskan dengan perbicaraan penuh (lihat perenggan 55).]

Notes

For cases on bill of lading, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1276–1413.

For cases on fraud, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 251–258.

For cases on striking out action on ground of time bar generally, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2456–2460.

Cases referred to

Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301, FC (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Blue Nile Co Ltd v Emery Customs Brokers (S) Pte Ltd [1992] 1 SLR 296, HC (refd)

Bradford Third Equitable Benefit Building Society v Borders [1941] 2 All ER 205, HL (refd)

Brown Jenkinson & Co Ltd v Percy Dalton [1957] 2 QB 621; [1957] 2 All ER 844, CA (refd)

Capital Insurance Bhd v Cheong Heng Loong Goldsmiths (KL) Sdn Bhd [2005] 6 MLJ 593, FC (refd)

Datuk Jagindar Singh & Ors v Tara Rajaratnam [1986] 1 MLJ 105, PC (refd)

Hanson v Hamel and Horley Ltd [1922] 2 AC 36, HL (refd)

Hartecon JV Sdn Bhd v Hartela Contractors Ltd [1996] 2 MLJ 57, CA (refd)

Henry Smith & Co v The Bedouin Steam Navigation Company Limited [1896] AC 70, HL (refd)

Hunter Grain Pty Ltd v Hyundai Merchant Marine Co Ltd & Anor (1993) 117 ALR 507, FC (refd)
JI MacWilliam Co Inc v Mediterranean Shipping Co SA [2005] 2 AC 423, HL (refd)
Lickbarrow v Mason 2 TR 35 (refd)
Magill v Magill [2006] HCA 51, HC (refd)
Panatron Pte Ltd & Anor v Lee Cheow Lee & Anor [2001] 3 SLR 405, CA (refd)
Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim [2003] 3 MLJ 460, CA (refd)
Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (M) Bhd [2004] 2 MLJ 31, CA (refd)
Victor Cham & Anorv Loh Bee Tuan [2006] 5 MLJ 359, CA (refd)

Legislation referred to
Bills of Lading Act 1855 [UK]
Carriage of Goods by Sea Act 1950 s 6
Limitation Act 1953 s 6(1)(a)

R Tharmy (Tanya Lopez with him) (Shook Lin & Bok) for the plaintiff.
Jeremy Joseph (JY Chong with him) (Joseph & Partners) for the first defendant.
Mohan Das (Zaid Ibrahim) for the second defendant.

Ramly Ali J:

THE PLAINTIFF'S CLAIM

[1] The plaintiff's cause of action against the defendants is for the tort of deceit by virtue of the fraudulent misrepresentation made by the defendants in the bill of lading issued by the defendants. The plaintiff's claim against the defendants is for compensation for the sum of US$1,446,469.58 together with interest and costs, being the loss and damage suffered by the plaintiff in relying on the said bill of lading issued by the defendants.

FACTUAL BACKGROUND

[2] The plaintiff through a contract dated 4 March 1994 (No 94HBM-002) ('contract of sale'), agreed to sell 56 containers of plywood ('the cargo') to Hebei Metal & Minerals Import and Export Corporation ('the buyer'). The express terms of the contract of sale stipulate that:

(a) the shipment of the cargo must not be later than 30 March 1994;

(b) the cargo be loaded at the Malaysian Port;

(c) the cargo be discharged at Xingang Port, China; and

(d) payment to be made by way of irrevocable letter of credit.

[3] For the purpose of the shipment of the cargo, the plaintiff agreed to enter into a contract of carriage for the cargo with the defendants. The said contract of carriage is to be evidenced by a bill of lading No PKXG-4018 on the following terms:

(a) the defendants are to issue a shipped on board bill of lading dated 30 April 1994; and

(b) the cargo should be transported from Port Klang direct to Xingang Port, China.

(c) the bill of lading was issued by the defendants indicating compliance with the said terms.

[4] The second defendant was at all material times the agent of the first defendant.

[5] The first defendant issued the bill of lading as 'shipped on board' on 30 April 1994 about the vessel TUO HE V103 ('TUO HE') at Port Klang and for discharge at Xingang Port, China, purporting to enter into the contract of carriage with the plaintiff. The defendants in the bill of lading made the following representations/statements:

(a) the cargo was shipped on board on 30 April 1994; and

(b) TUO HE's port of discharge is Xingang Port, China.

[6] Relying on the said representations, the plaintiff submitted, inter alia, the bill of lading to the negotiating bank for due payment pursuant to a letter of credit. However, the buyer obtained an injunction to stop one Bank of China, Changsha from releasing funds pursuant to the letter of credit on the ground that the bill of lading was fraudulent.

[7] It was subsequently discovered that the cargo was not 'shipped on board' on 30 April 1994 as represented by the bill of lading and the cargo was in fact discharged at Hong Kong before being transshipped on another vessel to Xingang Port, China.

[8] In the arbitration between the buyer and the plaintiff before the China International Economic and Trade Arbitration Commission, Beijing ('CIETAC') in relation to the dispute concerning the contract of sale, CIETAC granted an award dated 2 September 1996 in favour of the buyer. Pursuant to the said award, the plaintiff made payments to the buyer and incurred loss and expense totaling US$276,230.

[9] The plaintiff in this suit is seeking compensation from the defendants for the total sum to US$1,446,469.58 together with interest and costs, being the loss of the cargo (US$1,170,239.58) and the payments made in connection to the award (US$276,230) in relying on the said representations made by the defendants.

[10] The defendants have admitted during cross-examination of their witnesses (DW1 and DW2) the followings:

(a) the defendants had falsely stated the name of the port of discharge for TUO HE as Xingang Port, China in the bill of lading (p 25 notes of evidence);

(b) the defendants had falsely represented that the cargo was shipped on board as 30 April 1994 in the bill of lading (p 25 notes of evidence);

(c) the bill of lading was signed by the second defendant on behalf of the first defendant (p 23 notes of evidence); and

(d) the second defendant was duly authorised to issue the bill of lading on behalf of the first defendant (p 23 notes of evidence).

[11] The following oral testimonies of the plaintiff's witnesses (PW1, PW2 and PW3) which were not subjected to cross-examination by the defendants' solicitors are deemed to be accepted and admitted as true by the defendant:

(a) the cargo was worth US$1,170,239,58 in 1994;

(b) the plaintiff had paid the sum of RM208,903.40 to the second defendant for the shipment of the cargo;

(c) the sum of US$176,230.00 had been paid by the plaintiff to the buyer on or about 11 October 1996, as compensation, pursuant to the said award. The plaintiff had further paid the sum of US$100,000 as arbitration and legal fees pertaining to the said award;

(d) the total loss suffered by the plaintiff in relying on the representations in the bill of lading is US$1,446,469.58;

(e) the plaintiff had tried to mitigate its loss by requesting for return of the cargo and by requesting for waiver of import duty;

(f) the cargo had been stuffed and ready for shipment before 30 April 1994;

(g) 'Time at Gate' in the Port Manifest in pp 18–75 of bundle D (exh D40) means the time at which the container was accepted and kept at port waiting to be loaded on to the vessel for shipment. Containers would be ready for shipment earlier than the 'Time at Gate' as most of the times, the arrival of the vessel is delayed and therefore, the containers

would be kept at the storage of the warehouse and/or haulage company until notification. When the containers are hauled back to the port and accepted by the port, that would be the date for 'Time at Gate'; and

(h) the cargo had to be shipped direct to Xingang Port.

[12] It is a general rule that the failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witnesses testimony (see *Capital Insurance Bhd v Cheong Heng Loong Goldsmiths (KL) Sdn Bhd* [2005] 6 MLJ 593 (FC); *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (M) Bhd* [2004] 2 MLJ 31 (CA).

THE DEFENDANTS' CONTENTION

[13] The defendants admit that the date on the bill of lading is false. But the defendants submit that the plaintiff has failed to prove that the defendants intended (or induced) the plaintiff to act on the false representation in light of the clear and convincing evidence to the plaintiff's own involvement in the backdating of the bill of lading itself.

[14] The defendants further contend the plaintiff had the motive to produce a bill of lading dated 30 April 1994; they knew the vessel would not be able to load on or before 30 April 1994; and they requested the defendant to backdate the bill of lading to 30 April 1994. Now, they are instituting a suit against the defendant for losses suffered for alleged fraudulent misrepresentation over the false date on the bill of lading, when they were the ones who requested for it. They come to court with unclean hands and seeking equity and justice.

[15] The defendants also contend that the circumstances in which the plaintiff and defendants agreed to backdate the bill of lading invalidates the bill of lading (on the basis of fraud instigated by plaintiff) and also it establishes the 'disguise' as to why the bill of lading was backdated to begin with, thus also exposing the plaintiff's motive of 'covering up' for their own breach towards the buyer. In this respect, the defendants contend that it is illegal and against public policy for a wrongdoer to be allowed to profit from his wrongdoings (*exturpi causa non oritur action*).

ISSUES TO BE DETERMINED

[16] To oppose the plaintiff's claim, the defendants have raised the following two issues for consideration:

(a) Whether the defendants have fraudulently misrepresented to the plaintiff the date on the bill of lading; and

(b) Whether the plaintiff's suit is time barred under the applicable law.

FINDINGS OF COURT

[17] The plaintiff's claim against the defendant is under the tort of deceit by virtue of the fraudulent misrepresentations made by the defendants in the bill of lading. It is settled that a person can be held liable in tort to another if he knowingly or recklessly makes a false statement to that other with the intent that it would be acted upon and that other does act upon it and suffers damage.

[18] In *Panatron Pte Ltd & Anor v Lee Cheow Lee & Anor* [2001] 3 SLR 405, the Singapore Court of Appeal decided as follows:

> The law as regards fraudulent representation is clear. Since the case of *Pasley v Freeman* [1789] 3 Term Rep 51, it has been settled that a person can be held liable in tort to another, if he knowingly or recklessly makes a false statement to that other with the intent that it would be acted upon, and that other does act upon it and suffers damage. This came to be known as the tort of deceit. In *Derry v Peek* (1889) 14 App Cas 33 7 the tort was further developed. It was held that in an action of deceit the plaintiff must prove actual fraud. This fraud is proved only when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.
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> The essentials of this tort have been set out by Lord Maugham in *Bradford Building Society v Borders* [1941] 2 All ER 205. Basically these are the following essential elements. First, there must be a representation of fact made by words or conduct. Second, the representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff. Third, it must be proved that the plaintiff had acted upon the false statements. Fourth, it must be proved that the plaintiff suffered damage by so doing. Fifth, the representation must be made with knowledge that it is false; it must be willfully false, or at least made in the absence of any genuine belief that it is true.

[19] In *Victor Cham & Anor v Loh Bee Tuan* [2006] 5 MLJ 359, the Court of Appeal decided:

> Fraudulent misrepresentation comes under the tort of deceit. To succeed in his claim, the respondent in this case needs to establish that he had acted in reliance on the fraudulent misrepresentation and that the representation was false. He further needs to establish that the first appellant had made those statements knowingly or recklessly without caring whether it was true or false. And that as a result of reliance on such representation, the Respondent had suffered damage. For the elements of the tort of deceit, see *Panatron Pte Ltd v Lee Cheow Lee* [2001] 3 SLR 405.

[20] If a bill of lading contains a statement as to the date of shipment and the ship's agent signs the bill knowing the statement to be untrue, the person so signing is liable in fraud to anyone who suffers loss by relying on the representation. This was stressed by *Scrutton on Charterparties and Bills of Lading*, (20th Ed) at pp 115–118, 434–437 in the following passage:

> In addition to founding estoppels, a representation in a bill of lading may give rise to an action in tort at the suit of a person who relies upon the representation, and thereby suffers loss. Thus, if a bill of lading contains a statement as to the apparent condition of the goods, or the date of shipment, or a similar matter, and the master or ship's agent signs the bill knowing the statement to be untrue, the person so signing is liable in fraud to anyone who suffers loss by relying on the representation.

[21] The following extract from *Clerk and Lindsell on Torts* (17th Ed, para 14–01) gives a succinct description of the tort of deceit:

> The tort involves a false representation made by the defendant, who knows it to be untrue, or who has no belief in its truth, or who is reckless as to its truth. If the defendant intended that the plaintiff should act in reliance on such a representation and the plaintiff in fact does so, the defendant will be liable in deceit for the damage caused.

[22] The High Court of Australia in the case of *Magill v Magill* [2006] HCA 51, ruled that the tort of deceit provides a legal remedy for harm suffered in consequence of dishonesty; and a common form of dishonesty is a false representation fraudulently made. It was laid down in that case that a representation is fraudulently made if the maker of the representation made it knowing it to be false or recklessly, neither knowing nor caring it was false or true.

[23] Lord Maugham in the case of *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205 at p 211 had summarised the four essential elements which a plaintiff has to establish in an action for deceit or fraud as follows:

> First, there must be representation of fact made by words, or it may be conduct. This phrase will include a case where the defendant has manifestly approved and adopted a representation made by some third person. On the other hand mere silence, however morally wrong, will not support an action of deceit. *Peek v Gurney* and *Arkwright v Newbold*.
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> Secondly, the representation must be made with knowledge that it is false. It must be willfully false or at least made in the absence of any genuine belief that it is true. *Derry v Peek* and *Nocton v Lord Ashburton*.

Thirdly, it must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which will include the plaintiff in the manner which resulted in damage to him *Peek v Gurney* and *Smith v Chadwick*. If however, fraud be established it is immaterial that there was no intention to cheat or injure the person to whom the false statement was made. *Derry v Peek* and *Peek v Gurney*.

Fourth, it must be proved that the plaintiff has acted upon the false statement and has sustained damage by doing so. *Clark v Dickson*.

[24] Based on the above established principles, in order for the plaintiff in the present case to establish its action for tort of deceit against the defendants, the plaintiff has to show the followings:

(a) the said representations of fact by the defendants in the bill of lading were made by words or conduct;

(b) the said representation were made with the intention that the said representation would be acted upon by the plaintiff, or by a class of persons which included the plaintiff;

(c) the plaintiff had acted upon the false statements;

(d) the plaintiff had suffered damage by doing so; and

(e) the said representations were made with the knowledge that the said representations are false.

[25] The court shall now deal with the evidence in the present case in order to determine whether the plaintiff had established all the relevant elements cited above.

[26] As to the first element, there is no dispute that the said representations in the bill of lading were made by the second defendant on behalf of the first defendant by words in writing (as appears in the said bill of lading) through DW1. At p 23 of the notes of evidence, DW1 said:

This bill of lading was issued on behalf of Cosco (the first defendant) by the second defendant. I've authority to issue the bill of lading first defendant did not dispute my authority to issue the bill of lading.

[27] As regard to the second element, the court finds guidance in the decision of the Court of Appeal in England in *Brown Jenkinson & Co Ltd v Percy Dalton* [1957] 2 QB 621; [1957] 2 All ER 844 where it was held:

The next question which arises is whether the false representation was made by the shipowners with the intention that it should be relied on. A shipowner clearly intends that the bill of lading which he issues should be relied on. He intends that it should be relied on by those into whose hands it properly comes: consignees,

A bankers and endorsees must be within his contemplation. A bill of lading is issued with the purpose that it should be relied on. This could not have been more clearly illustrated than it was in the testimony of the plaintiffs' witness. He knew, for example, that the banks are very often prepared to advance money if clean bills of lading are forthcoming. If a shipper knows that he will only be paid if be can B present a clean bill of lading and knows that the goods which he is shipping are so defective that they could not be given a clean bill, and if in order to get his money he persuades a shipowner to issue a clean bill, the bill will be relied on by others, it seems to me impossible to contend that the shipowner does not make a representation with the intention that it should be acted upon.

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[28] In the present case the defendants were aware that the bill of lading would be relied on by the plaintiff to meet the requirements of the latter of credit in the transaction, so that the plaintiff can submit it to the bank and D negotiate the bill. DW1 in his answer no 9 of the witness statement (DW1A) says so. This clearly shows that the said representations were made with the knowledge and intention that the said representations would be acted upon by the plaintiff or by a class of persons which include the plaintiff.

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[29] As to the third element, the plaintiff must establish that the plaintiff had acted upon the said false representation. There is no dispute that the plaintiff had submitted the bill of lading for due payment under the letter of credit. Reference is made to answer 26 of PW2's witness statement (PW2A) F which is deemed to be admitted and accepted by the defendants as the defendants failed to cross-examine PW2 on this issue during trial.

[30] The fourth element is that the plaintiff had suffered damage by acting upon the said false representation.

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[31] In this case, the court is satisfied that the plaintiff had adduced sufficient evidence during trial to establish this element. The buyer had rejected the cargo due to the false statement in the bill of lading and the H plaintiff had to pay compensation to the buyer under the arbitration award in China. The bank had also refused to accept the documents presented by the plaintiff for due payment under the letter of credit. The cargo was worth US$1,170,239.58 in 1994. The plaintiff had paid the sum of RM208,903.40 to the second defendant for the shipment of the cargo. The sum of I US$176,230 had been paid by the plaintiff to the buyer on or about 11 October 1996 as compensation pursuant to the said arbitration award in China. The plaintiff had further paid the sum of US$100,000 as arbitration and legal fees pertaining to the said award. The total damage suffered by the plaintiff in relying on the representation in the bill of lading is

US$1,446,469.58. These evidence are not subjected to cross-examination by the defendants' solicitors and are deemed to be accepted and admitted by the defendants.

[32] The fifth element which must be established by the plaintiff is that the said representations were made with the knowledge that they are false.

[33] The defendant have admitted at trial during cross-examination of DW1 and DW2 that the defendants had made false statements in the bill of lading ie that the cargo was shipped on board on 30 April 1994 and that the port of discharge for TUO HE was Xingang Port, China. The relevant portions of the notes of evidence are reproduced below:

> The actual port of discharge for MV TUO HE was Hong Kong. I agree that the information for port of discharge in this bill of lading is false. The date for shipment stated in this bill of lading is 30 April 1994. The actual date for the shipment on board for the cargo is 9 May 1994. I agree that the date for shipment in the bill of lading is false. I agree during conversation with Mrs Yip, she told me that transshipment was prohibited. (DW1 — at p 25 notes of evidence). 'I am aware of the arrival date of MV TUO HE. The date of 30 April 1994 is wrong. The port of discharge for TUO HE is Xingang via Hong Kong. I know the consequences of giving false information in the bill of lading'. (DW2 — at p 31 notes of evidence).

[34] The court is satisfied that the plaintiff has established beyond reasonable doubt that the defendants are liable to the plaintiff for the tort of deceit in making fraudulent misrepresentations in the bill of lading. Not only that, the defendants have admitted to issuing the fraudulent bill of lading.

[35] The defendants' clearly do not deny their misconduct in making the said representations in the bill of lading. Instead, as a purported defence to the plaintiff's legitimate action against the defendants, the defendants rely on the equitable maxim of *ex turpi causa non oritur action* — the defendants allege that the plaintiff itself had committed fraud in requesting the defendants to make the said representation in the bill of lading. The plaintiff denies this allegation of the defendants.

[36] If the defendants are asserting this allegation, the evidential burden lies on the defendants to prove beyond reasonable doubt that the plaintiff had committed the alleged fraud by requesting the defendants to make the said representations in the bill of lading.

[37] The Federal Court in the case of *Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301 had clearly decided that:

A It is now settled law that the standard of proof required where there is an allegation of fraud in a civil proceedings must be one of beyond reasonable doubt and not on the balance of probabilities.

The Federal Court further held that: suspicion however great, is insufficient to prove fraud which needs to be proved beyond any reasonable doubt.

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[38] The court finds that in the present case the defendants have failed to discharge the onus of proof of the alleged fraud by the plaintiff bearing in mind the following, incontrovertible evidence:

C (a) When the defendants received the plaintiff's letters dated 28 June 1994, 11 July 1994 and 12 July 1994, which sought for an explanation for the backdating of the bill of lading and the non-arrival of TUO HE at Xingang Port, China, the defendants' only explanation and reply was that TUO HE does not call at Xingang and the bill of lading is legal D tender and that they would investigate. If the defendants' allegation that the plaintiff had requested the defendants to make the fraudulent misrepresentation had been true, the immediate and reasonable reaction from the defendants would have been to inform the plaintiff that the defendants had acted on the plaintiff's specific instruction.

E (b) Despite knowing that the defendants had given false information in the bill of lading the defendants' own documents such as the facsimile dated 13 July 1994, 6 February 1994 and a certificate dated 22 December 1994 state otherwise. This clearly destroys the credibility of the F defendants' witnesses and shows that there is no truth to the defendants' allegation.

(c) Exhibit P4 and exh P36 demonstrate the importance of the date of issuance of the bill of lading. This is in the line with the plaintiff's continuance and repetitive instruction to the defendants that the cargo G be shipped on board on or before 30 April 1994 which was admitted by the defendants' own witness, DW1, during trial (at pp 24 and 25 of the notes of evidence).

(d) It is a glaring omission on the part of the defendants that there is no H document whatsoever, whether contemporaneous or not, from the defendants which allude to the defendant's allegation that it was the plaintiff who had instructed the defendants to make the false representation in the bill of lading.

I (e) The testimony of the defendants' witnesses show that the defendants would follow the amendments made by the shipper in the bill of lading (not that there were instructions by the plaintiff to make false statements on the bill of lading) and further, confirms that the final decision as to whether to make the amendments on the bill of lading lies with the defendants — not the plaintiff.

[39] Based on the above consideration, the court finds that the defendants have failed to discharge the onus of proving fraud on the part of the plaintiff and in fact, have merely as an afterthought raised the allegation that it was the plaintiff who had instructed the defendants to make the said representation in the bill of lading. The defendants' defence of *ex turpi causa non oritur action* fails. This defence was raised by the defendants for the first time when they filed their defence to this action.

[40] The defendants further attempt to cloud the issue at hand by asserting that it was the plaintiff, and not the defendants, who would have had the motive to make the false statements in the bill of lading. Such allegation by the defendants is preposterous considering that:

(a) It has consistently been the plaintiff's case that the bill of lading date should correspond with the letter of credit requirements. That is why the plaintiff had repeatedly informed the defendants of the importance that the cargo must be shipped on board not later than 30 April 1994; and

(b) There is no ominous or surreptitious motive on the part of the plaintiff, as suggested by the defendants. As the supplier of goods the plaintiff would naturally want to comply with all the terms of the buyer's letter of credit. And PW3 had given an acceptable explanation why the supporting documents (certificate of quality, certificate of origin, packing list) were dated 30 April 1994 to match the loading date of the cargo.

SIGNIFICANCE OF THE BILL OF LADING

[41] In the present case, the bill of lading was only issued to the plaintiff after 30 April 1994, after the vessel carrying the cargo was deemed to have sailed. The significance and importance of the bill of lading to the plaintiff cannot be undermined.

[42] In *Hanson v Hamel and Horley Ltd* [1922] 2 AC 36, the House of Lords acknowledged this realty in the following words:

> 'On shipment' is an expression of some latitude. Bills of lading are constantly signed after the loading is complete and in some cases, after the ship has sailed.

[43] The House of Lords again in the case of *JI MacWilliam Co Inc v Mediterranean Shipping Co SA* [2005] 2 AC 423 decided:

> It is always the task of the court to determine the true nature and effect of a legal document, and in performing that task the court is not bound by the label which the parties have chosen to apply to it. Where, however, the court is considering a

bona fide mercantile document, issued in the ordinary course of trade, it will ordinarily be slow to reject the description which the document bears, particularly where the document has been issued by the party seeking to reject the description. This document called itself a bill of lading.

[44] In *Hunter Grain Pty Ltd v Hyundai Merchant Marine Co Ltd & Anor* (1993) 117 ALR 507 the Federal Court of Australia highlighted the need for honesty in international trade and stated as follows:

> Honesty and integrity in relation to the signing of receipts for goods the subject of bills of lading is essential if persons engaged in international trade are to have any confidence in documents which play such a vital role in relation to the authorisation of the payment of money.
>
> As the statement in *Scrutton on Chaterparties* that 'if a bill of lading contains a statement as to the apparent condition of the goods, or the date of shipment, or a similar matter, and the master or the ship's agent signs the bill knowing the statement to be untrue, the person so signing is liable in fraud to anyone who suffer loss by relying on the representation' correctly state, Hyundai was liable in fraud.

[45] The Bills of Lading Act 1855 which applies with legal effect in Malaysia further emphasises the need to issue a genuine and valid bill of lading as the bill of lading can be used as an instrument for negotiation between the shipper and a third party. The relevant sections of the Act are as follows:

Preamble:

> Whereas, by the custom of merchants, a bill of lading of goods being transferable by endorsement, the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner; and it is expedient that such right should pass with the property; and whereas it frequently happen that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a bona fide holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid.

Section 3

> Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods that not been in fact laden on board: Provided, that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was

caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some parson under whom the holder claims.

[46] In *Blue Nile Co Ltd v Emery Customs Brokers (S) Pte Ltd* [1992] 1 SLR 296, the High Court of Singapore decided that the words 'shipped on board' which were typed on the face of the bills, suggested that the bills evidence shipment.

[47] In *Henry Smith & Co v The Bedouin Steam Navigation Company Limited* [1896] AC 70, Lord Watson of the House of Lords stated:

> The rule of law applicable to this case appears to me to be settled beyond dispute. The master of a ship has no authority to grant bills of lading for goods which were not put on board his vessel; but, when he signs a bill acknowledging the receipt of a specific quantity of goods, the shipowner is bound to deliver the full amount specified, unless he can sh(o)w that the whole of some part of it was in fact not shipped. If the owner is able to satisfy that onus, by proving a short shipment, he is, to that extent, relieved from the obligation which would otherwise attach to him under the bill of lading, even in a question with an onerous holder.

[48] Backdating of a bill of lading in order to bring it within the shipment time in the credit is an act of fraud and amounts to forgery. The learned writer of *Schmitthoff's Export Trade The Law and Practice of International Trade* at p 584 states as follows:

> A issuer of a bill of lading, who deliberately backdates it in order to bring it within the shipment time in the credit acts fraudulently, and as far as the issue of bill is concerned, there is no difference between the case where he has forged the bill and where he has deliberately backdated it.

[49] Finally, in *Lickbarrow v Mason* 2 TR 35 it was stated that:

> … for a bill of lading is an acknowledgement by the captain, of having received the goods on board his ship: therefore it would be a fraud in the captain to sign such a bill of lading, if he had not received goods on board; and the consignee would be entitled to his action against the captain for the fraud.

[50] As such, the importance of issuing a genuine and valid bill of lading in mercantile trade cannot be disputed. The bill of lading, by virtue of the fraudulent misrepresentations contained therein is a nullity and therefore deems all transactions involving the plaintiff and the buyer, frustrated. The defendants who made the fraudulent misrepresentations in the bill of lading

A are therefore wholly liable to the plaintiff for all damages suffered by the plaintiff as a result of the frustrated contract between the buyer and the plaintiff.

ISSUE OF LIMITATION

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[51] The defendants have raised the issue of limitation in order to defeat the plaintiff's claim against them. The plaintiff submits that the plaintiff's claim against the defendants falls under s 6(1)(a) of the Limitation Act 1953 (time bar after six years) whilst the defendants submit that the plaintiff's C claim against the defendants falls under s 6 of the Carriage of Goods by Sea Act 1950 ('COGSA') (time bar after one year). The plaintiff's suit against the defendants was filed after three years from the date of delivery of the cargo.

[52] The defendants have raised this same issue in their respective D applications to strike out the plaintiff's writ and statement of claim on the ground of limitation period. In fact, the Court of Appeal on 3 December 2007 had dismissed the first defendant's application to strike out and directed that the matter be remitted to the High Court for trial. The defendants have not lodged any appeal to the Federal Court on the said decision of the Court E of Appeal.

[53] In effect, the defendants are estopped from raising this same issue of limitation again.

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[54] The principles behind issue estoppel are well-established and are set out in the cases below:

(a) *Hartecon JV Sdn Bhd v Hartela Contractors Ltd* [1996] 2 MLJ 57 where the Court of Appeal decided as follows:

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> Once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened. Although the first decision was made on an interlocutory matter which was purely procedural in nature, it was nevertheless binding on the court and on all H parties to the lis until its reversal on appeal.

(b) *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 where the Supreme Court decided as follows:

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> There are two kinds of estoppels per *rem judicatum* ie cause of action estoppels and issue estoppels. The cause of action estoppels prevents reassertion of a cause of action which has been determined in a final judgment by the same parties. On the other hand, the issue estoppels prevents contradiction of the correctness of a final judgment by the same parties in a subsequent proceeding. Further, the parties are also

prevented from asserting a cause of action or issue which should have been brought forward in the earlier action, but was not, whether deliberately or inadvertently.

[55] By virtue of the above, the court is of the view that the defendants cannot be allowed to raise the issue of limitation again at this stage of the proceedings as the matter has already been decided upon and the Court of Appeal in dismissing the defendants' application and has directed that this matter proceed to full trial.

DAMAGES SUFFERED BY THE PLAINTIFF

[56] The above considerations have disclosed that the plaintiff has proved the defendants' liability to the plaintiff for fraudulent misrepresentation under the tort of deceit and the plaintiff's cause of action is not time-barred, the plaintiff therefore is entitled to claim for all loss suffered by the plaintiff.

[57] The following authorities are relevant for consideration on this issue:

(a) *Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim* [2003] 3 MLJ 460 where the Court of Appeal decided as follows:

> The relevant law governing the measure of damages for fraudulent misrepresentation is set out in the judgment of Lord Denning MR in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 All ER 119. He said:
>
> > In fraud, the defendant has been guilty of a deliberate wrong by inducing the plaintiff to act to his detriment. The object of damages is to compensate the plaintiff for all the loss he has suffered, so far, again, as money can do it. In contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. In fraud, they are not so limited. The defendant is bound to make reparation for all the actual damage directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say:
> >
> > > I would not have entered into this bargain at all but for your representation. Owing to your fraud, I have not only lost all the money I paid you, but, what is more, I have been put to a large amount of extra expense as well and suffered this or that extra damages.
>
> All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen. For instance, in this very case the plaintiff has not only lost the money which he paid for the business, which he would never have done if there had been no fraud: he put all that money in and lost it; but also he has been put to expense and loss in trying to run a business which has turned out to be a disaster for him. He is entitled to damages for all his loss, subject, of course,

A to giving credit for any benefit that he has received. There is nothing to be taken off in mitigation: for there is nothing more that he could have done to reduce his loss. He did all that he could reasonably be expected to do.

It does not lie in the mouth of the fraudulent person to say that they [the damage] could not reasonably have been foreseen.

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(b) *Maritime Fraud* (2003) by Paul Todd at p 87 states as follows:

An action for deceit also provides better remedies than in normal tort and contract actions. In an action for fraudulent misrepresentation, or deceit, for example, damages will fully compensate the plaintiff's loss, without regard to normal remoteness of damage rules.

C

(c) *Datuk Jagindar Singh & Ors v Tara Rajaratnam* [1986] 1 MLJ 105 where the Privy Council decided as follow:

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The object of damages for the tort of deceit, as for other torts, is to put the injured party into as good a position financially as he would have been in if the tort had not been committed.

E **[58]** The court has demonstrated above in para 11 that the defendants are deemed to have admitted and accepted the plaintiff's evidence that the plaintiff has suffered the loss of US$1,446,469.58 together with interest and costs (as prayed for in para 16 of the plaintiff's amended statement of claim dated 14 May 2008).

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[59] The plaintiff had taken all the steps necessary to reduce the loss suffered by the plaintiff as a result of the fraudulent misrepresentation by the defendants. In attempting to mitigate the said loss, the plaintiff:

G (a) had made several requests, without success, to the first defendant in attempt to get back the cargo;

(b) had successfully obtained a waiver in import duty from the Ministry of Finance for the shipment of the cargo back from China; and

(c) had requested the defendants to compensate the plaintiff for its loss.

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[60] However, apart from the waiver in import duty, there has been no response from the defendants. The court finds that the plaintiff has suffered considerable financial loss due to the actions and/or inactions of the defendants in failing to compensate the plaintiff's or to return the cargo to them. The defendants have been unjustly enriched by the retention of the cargo.

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CONCLUSION

[61] Based on the above considerations, the court concludes that:

(a) The plaintiff has established beyond reasonable that the defendants are liable to the plaintiff for the tort of deceit in making fraudulent misrepresentation in the bill of lading.

(b) The defendant has failed to discharge the onus of proving fraud on the part of the plaintiff in instructing the defendants to make the said representation in the bill of lading and thus the defendants' defence of *ex turpi causa non oritur action* must fail.

(c) The plaintiff has proven beyond reasonable doubt that the defendants have caused loss and damage to the plaintiff in the sum to telling US$1,446,469.58 as a result of the fraudulent misrepresentations made by the defendants in the bill of lading.

[62] Therefore, judgment be entered for the plaintiff against the defendants as prayed in the re amended writ and statement of claim dated 17 May 2008 filed herein.

Plaintiff's application allowed with costs.

Reported by Ashgar Ali Ali Mohamed